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No. 76-747

In the Supreme Court of the United States

OCTOBER TERM, 1976

PENT-R-BOOKS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 538 F. 2d 519. The opinions of the district court (Pet. App. 27a-62a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1976. A petition for rehearing was denied on August 3, 1976. On October 26, 1976, Mr. Justice Marshall extended the time to file a petition for a writ of certiorari to and including November 30, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c), but would more properly rest upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a promise by a defendant not to repeat the offending conduct renders a case moot.

2. Whether the Pandering Law violates the First Amendment or should not be enforced in this case.

STATEMENT

This case arises out of petitioner's violations of 39 U.S.C. 3008 (the "Pandering Law"), which provides that recipients of "sexually provocative" mail may request the Postal Service to direct the sender to delete the addressees' names from all mailing lists, or be liable for contempt of court in the event of a subsequent mailing to these persons. Petitioner, which concededly made such second mailings, advances certain statutory and constitutional claims regarding its ultimate liability to a contempt order.[1]

In 1968-1969 petitioner mailed approximately 10,000,000 advertisements for "The Photographic Manual of Sexual Intercourse." Protests by addressees led to the issuance of 248,500 postal prohibitory orders (Pet. 13). The Postal Service subsequently found that the prohibitory orders had been violated by at least 500 subsequent mailings to the same addressees (*ibid.*). It sought compliance orders from the district court to prevent further mailings to the named addressees.

Over petitioner's objections, the district court issued the compliance orders (Pet. App. 27a-62a).[2] The court of appeals held that the district court had authority to enter compliance orders in this case, and it sustained the issuance of several particular orders (Pet. App. 5a-12a). It concluded,

[1]No such order has yet been issued.

[2]The district court's governing decision on the questions at issue here, issued in a case that was not before the court of appeals, is set forth at Pet. App. 63a-82a. This litigation concerns 20 consolidated actions seeking compliance orders. An additional 341 cases are pending in which compliance orders are contemplated; these have been held in abeyance until the issues in this case are settled (Pet. 11-12).

however, that some of the individual orders had been improperly issued, and it reversed them (*id.* at 12a-26a).

ARGUMENT

The Pandering Law "provides a procedure whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative'." *Rowan* v. *Post Office Department*, 397 U.S. 728, 729-730. Under the Pandering Law, the Postmaster General, upon the request of an addressee, orders the sender (by "prohibitory order") to refrain from further mailings and to delete the addressee's name from the sender's mailing lists (39 U.S.C. 3008(b) and (c)), and if, after an opportunity for a hearing, the Postmaster General determines that the sender has violated the prohibitory order, he may request the Attorney General to obtain an order from the district court directing compliance (39 U.S.C. 3008(d)); this compliance order is enforceable by a contempt sanction.[3]

1. Petitioner argues (Pet. 17-19) that this case is moot because there is no reasonable likelihood of further mailings in violation of the prohibitory orders issued against it. Although petitioner concedes (Pet. 13) that it has already made repetitious mailings to the complaining addressees, thus rendering it liable to compliance orders, it argues that its new computer system renders a further wrongful mailing improbable.

[3]In order to be liable to contempt, therefore, a sender must have mailed objectionable material to the same addressee on three occasions. There must be a mailing to which the addressee objects, giving rise to a prohibitory order, a second mailing violating that order and leading to a compliance order, and a third mailing violating the district court's compliance order.

This argument is unpersuasive. Promises not to violate a statute in the future do not make a case moot, where past violations have been established. *United States* v. *W. T. Grant Co.*, 345 U.S. 629. A compliance order may properly be issued whenever there is a second mailing to the complaining addressee. As the court of appeals stated (Pet. App. 7a), "[t]here is no suggestion in the statute that either the Postal Service or the district court must determine that there is danger of yet a further violation of a prohibitory order before a compliance order may be issued." The addressees are not obliged to depend upon petitioner's assertion that it has a foolproof computer system; they may properly claim the protection of the district court's compliance order when, as here, undisputed violations of the Pandering Law have occurred.[4]

2. Petitioner's additional statutory and constitutional objections to the decision of the court of appeals have been definitively answered by this Court in *Rowan*, which considered and rejected analogous challenges to the Pandering Law.

Petitioner contends (Pet. 23) that deletion of the addressees' names from mailing lists is unconstitutional, because the statutory objective of shielding addressees from unwanted and offensive mail may be attained by less drastic means; petitioner maintains that the addressees may refuse

[4]For the same reasons, the issuance of the compliance orders was not an abuse of the district court's discretion. Petitioner asserts that no further improvements can be made to its computer system and that, therefore, an injunction serves no purpose. But petitioner's "liability to subjection to individual Compliance Orders of [the] court is the begetter of [its] praiseworthy compliance effort" (Pet. App. 7a). Moreover, it is not an abuse of discretion to issue a compliance order when, as here, the order "carries no penalty with it" (*ibid.*); if petitioner is correct that its system is foolproof, there will be [illegible] subsequent citation for contempt of the compliance

the mail at the time of delivery, or mark it "Refused" and return it to the sender. *Rowan* rejected this argument, holding that "the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable [nor] should the householder have to risk that offensive material come into the hands of his children before it can be stopped." 397 U.S. at 738.

Petitioner asks (Pet. 21) this Court to re-examine *Rowan*; it maintains that mailers cannot comply with the statute unless they refrain from mailing sexually oriented matter to large numbers of uncomplaining persons with names similar to those of the complainants.[5] This is not an inevitable result of compliance, although petitioner apparently has determined that it can make its computer system more thorough by using this method when sending advertisements to names obtained from rented mailing lists. But however that may be, the difficulties and consequences of compliance with the statute do not show that it is unconstitutional; to the contrary, petitioner's precautionary "practice of eliminating these names has played no small part in bringing about [petitioner's] present excellent compliance record" (Pet. App. 9a). To relax the statute, as petitioner requests, would result in a breach of the "wall" that Congress has allowed each person to erect between

[5]Petitioner also maintains that *Rowan* has been undermined by later cases, such as *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205. This is incorrect. In *Erznoznik* municipal officials forbade all outdoor screenings of sexually oriented movies, thereby shielding the sensibilities of the few at the expense of the many. The Pandering Law, by contrast, allows mailings of sexually oriented material to continue until individual addressees say it must stop; moreover, each citizen, and not some governmental official, makes the evaluation of the material he has received (cf. *Rowan*, *supra*, 397 U.S. at 737-738).

himself and sexual mail, a wall that "no advertiser may penetrate without [the citizen's] acquiescence." *Rowan, supra,* 397 U.S. at 738.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.

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[6]Petitioner's additional contentions are insubstantial. The court of appeals was entitled, in the interest of expedition, to apply the Federal Rules of Evidence to these cases, rather than to remand them to the district court solely for that purpose (Pet. App. 15a-18a). Moreover, both courts below properly rejected petitioner's allegation (Pet. 24-25) that the Postal Service engaged in selective enforcement by seeking compliance orders against petitioner, while declining to do so against material mailed by the American Civil Liberties Union. See Pet. App. 68a-69a. No claim of invidious or unconstitutional selectivity has been advanced sufficient to support a claim of selective enforcement. The use of common sense in employing the limited resources available to enforce the Pandering Law is not offensive to anything in the Constitution. *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244; *Oyler* v. *Boles*, 368 U.S. 448.